A

WONG SENG KAU

v.

CHONG CHIN FOOK

B

HIGH COURT MALAYA, JOHOR BAHRU
VERNON ONG LAM KIAT JC
[ORIGINATING SUMMONS NO: [MT-1] 24-3914-2006]
25 MARCH 2008

C ***CIVIL PROCEDURE:*** *Execution - Stay - Application for stay pending appeal - Special circumstances - Whether established*

This was the defendant's application for a stay of execution of the order requiring, *inter alia,* to demolish a part of the defendant's home kitchen and wall before surrendering the portion of land allegedly trespassed to the plaintiff. The defendant submitted that the subject matter of the matter was land on which was erected a building comprising of the defendant's home kitchen and wall and if the said wall and part of the kitchen was demolished, then the defendant's appeal would be rendered nugatory. The defendant further argued that he would suffer serious loss if the stay was not granted. The plaintiff, however, contended that the subject matter related to the defendant's home kitchen and walls were extended over the plaintiff's land and that the defendant could be compensated with costs and the affected premises be rebuilt by the plaintiff if the defendant's appeal was allowed. The issue that arose was whether in the particular circumstances of this case the defendant had established any special circumstances to justify making a stay order.

G **Held (granting application for stay):**

(1) The demolition works would effectively deprive the defendant of the results of the appeal. Assuming that the demolition was effected, the defendant would have to erect a new wall and reconstruct the kitchen area affected by the demolition. In so doing, execution of the order would destroy the subject matter of the action or deprive the defendant of the means of prosecuting the appeal. This constituted special circumstances which justified the granting of a stay of execution pending the disposal of the defendant's appeal to the court of appeal. (para 10)

Case(s) referred to:

Kosma Palm Oil Mill Sdn Bhd & Ors v. Koperasi Serbausaha Makmur Bhd [2003] 4 CLJ 1 FC ***(refd)***

Ming Ann Holdings Sdn Bhd v. Danaharta Urus Sdn Bhd [2002] 3 CLJ 380 CA ***(refd)***

RHB Bank Bhd v. Datuk Keramat Holdings Bhd [2004] 3 CLJ 646 HC ***(refd)***

Salim Ismail & Ors v. Lebbey Sdn Bhd (No 1) [1997] 1 CLJ 98 CA ***(refd)***

For the plaintiff - Albert Ding; M/s Woon Wee Yuen & Partners
For the defendant - Nor Ashikin; M/s Foo & Woon

Reported by Suhainah Wahiduddin

JUDGMENT

Vernon Ong Lam Kiat JC:

[1] This is the defendant's application (*vide* summons in chambers encl 15) for a stay of execution of the order dated 16 May 2007. The order contained the following terms:

> DI HADAPAN YA DATUK SYED AHMAD HELMY BIN SYED AHMAD
> HAKIM MAHKAMAH TINGGI MALAYA
> JOHOR BAHRU, JOHOR — DALAM KAMAR
> 16 MEI 2007
>
> PERINTAH
>
> Atas permohonan pihak Plaintif yang dinamakan di atas melalui Saman Pemula bertarikh 10 November 2006 (Lampiran 3) dalam kehadiran En. Lawrence Chiong Sheng Fan, Peguamcara bagi Plaintif dan Cik Nor Ashikin binti Abdul Rahim, Peguamcara bagi Defendan DAN SETELAH MEMBACA Afidavit Sokongan Plaintif yang diikrarkan pada 9 November 2006, Afidavit Balasan Defendan yang diikrarkan pada 20 Disember 2006 dan Afidavit Tambahan Plaintif yang diikrarkan pada 9 Januari 2007 DAN SETELAH MENDENGAR hujahan-hujahan Peguamcara Plaintif dan Defendan yang tersebut pada 13 Mac 2007 MAKA PADA HARI INI DIPERINTAHKAN bahawa:
>
> 1. tanah yang diceroboh ("trespass") oleh Defendan dan/atau wakilnya dipulang balik kepada Plaintif mengikut pelan dan/atau ukuran yang dikeluarkan dan/atau diluluskan oleh Jabatan Ukur Johor bertarikh 19.9.2006 dalam masa tempoh empat belas (14) hari dari tarikh Perintah Mahkamah; dan

2. Defendan meruntuhkan tembok batu dan/atau sebarang pembinaan yang dibina oleh Defendan tanpa kebenaran Plaintif di atas tanah Plaintif dengan kos dan/atau pembelajaan Defendan sendirinya sebelum menyerahkan hakmilik kosong tanah yang diceroboh kepada Plaintif; dan

3. Defendan membayar gantirugi yang dialami oleh Plaintif akibat dari kelakuan Defendan yang menceroboh tanah dan/atau hakmilik tanah Plaintif tanpa kebenaran; dan

4. Timbalan Pendaftar dan/atau Penolong Kanan Pendaftar Mahkamah yang Mulia ini diberi kuasa yang sepenuhnya untuk menaksirkan gantirugi tersebut kepada Plaintif; dan

5. kos tindakan ini dibayar oleh Defendan kepada Plaintif.

Bertarikh pada 1 Ogos 2007

...
TIMBALAN PENDAFTAR
MAHKAMAH TINGGI MALAYA
JOHOR BAHRU

The Law

[2] The principles governing applications for stay of execution have been succinctly set out by the Court of Appeal in *Ming Ann Holdings Sdn. Bhd. v. Danaharta Urus Sdn. Bhd.* [2002] 3 CLJ 380 and the Federal Court in *Kosma Palm Oil Mill Sdn. Bhd. & Ors v. Koperasi Serbausaha Makmur Bhd* [2003] 4 CLJ 1 and may be summarised as follows:

1. An appeal shall not operate as a stay of execution unless the court so orders.

2. The onus is on the applicant to establish the existence of special circumstances to justify the grant of a stay of execution.

3. The reasons must relate to the enforcement of the judgment or order. They must be deposed in the affidavit filed in support of the application.

4. There are many factors that may constitute special circumstances and the fact that an appeal would be rendered nugatory if stay was refused is the most common one.

5. The merits of a party's case in a stay application is not a relevant matter for consideration.

6. It is not granted to give the unsuccessful party time to satisfy the judgment or to alleviate his problems.

Whether Special Circumstances Established?

[3] In considering whether special circumstances were established, I considered the written submissions of the defendant and the plaintiff. I also examined the following affidavits filed herein:

1. Defendant's affidavit affirmed on 1 June 2007 (encl. 14);

2. Plaintiff's affidavit in reply affirmed on 14 August 2007 (encl. 18); and

3. Defendant's affidavit in reply affirmed on 21 August 2007 (encl. 19).

Defendant/Applicant's Submission

[4] Learned counsel for the defendant submitted the following grounds:

i. Special circumstances (encl. 14 – paras 8 and 9)

   (a) The subject matter of the matter is land on which is erected a building comprising of the defendant's home kitchen and wall. If the said wall and part of the kitchen are demolished, then the defendant's appeal will be rendered nugatory.

   (b) If the appeal is allowed, the damages assessed and costs will be repaid to the defendant thereby rendering the assessment of damages and costs a futile exercise.

ii. Merits in defendant's appeal (encl. 14 – paras 5, 6, and 7).

   In support thereof learned counsel relied upon the 13 grounds which also formed the grounds of appeal in the memorandum of appeal.

iii. The defendant's application for stay was made expeditiously.

iv. The defendant will suffer serious loss if the stay is not granted. The plaintiff must prove that he is able to rebuild the subject to the original state and condition and refund the damages and costs if the defendant's appeal succeeds. In support thereof learned counsel cited the Court of Appeal decision in *Salim Ismail & Ors v. Lebbey Sdn. Bhd. (No. 1)* [1997] 1 CLJ 98. The case of *RHB Bank Bhd v. Datuk Keramat Holdings Bhd* [2004] 3 CLJ 646 was distinguished on the facts.

Plaintiff/Respondent's Submission

[5] Learned counsel for the plaintiff submitted that the defendant has not adduced any evidence to establish special circumstances. He argued that the subject matter relates to the defendant's home kitchen and walls which are extended over the plaintiff's land. Accordingly, the Court of Appeal's decision in *Salim (supra)* is irrelevant.

[6] Learned counsel also submitted that the defendant can be compensated with costs and that the affected premises be rebuilt by the plaintiff if the defendant's appeal is allowed. Further, it was argued that the only consideration when trying a stay application is the nugatory principle and nothing else. Learned counsel rounded with the submission that the plaintiff should not be denied the fruits of litigation.

Findings Of The Court

[7] Relying on the above principles enunciated by the Federal Court in *Kosma (supra)*, I considered whether in the particular circumstances of this case the defendant has established any special circumstances to justify making a stay order.

[8] The order in question requires the defendant to demolish a part of the defendant's home kitchen and wall before surrendering the portion of land allegedly trespassed to the plaintiff. The defendant is also ordered to pay damages and costs to be assessed.

[9] In the circumstances, the demolition of the defendant's home kitchen and wall relate to the execution of the order in question. If a stay of execution is not granted, how would it make the appeal if successful, nugatory?

[10] In my view, the demolition works would effectively deprive the defendant of the results of the appeal. Assuming that the demolition is effected, the defendant will have to erect a new wall and reconstruct the kitchen area affected by the demolition. In so doing, execution of the order would destroy the subject matter of the action or deprive the defendant of the means of prosecuting the appeal. This in my view constitutes special circumstances which justify the granting of a stay of execution pending the disposal of the defendant's appeal to the court of appeal. In the premises I granted an order in terms of the defendant's application for stay.

A B C D E F G H I